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EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Charter Communications, Inc. Petition for Determination of Effective Competition, MB Docket No. 18-283, CSR-8965-E

Dear Ms. Dortch:

NCTA – The Internet & Television Association ("NCTA") hereby responds to the Opposition of the Massachusetts Department of Telecommunications and Cable ("MDTC") to Charter Communication's above-referenced petition for determination of effective competition. MDTC's Opposition relies in large part on NCTA's comments in a wholly unrelated proceeding, and we submit this response to explain in a nutshell why that reliance completely misses the mark.

Section 623 of the Communications Act of 1934, as amended, exempts cable systems from rate regulation if they are subject to "effective competition."[1] The statutory definition of that term for purposes of Section 623 includes four distinct tests, the fourth of which – the so-called "Local Exchange Carrier" test – is at issue in this proceeding. Under that test, a cable system is subject to effective competition if

> a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers *by any means* (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator *which is providing cable service in that franchise area, but only if the video* programming

[1] 47 U.S.C. § 543(a)(2).

services so offered in that area are *comparable* to the video programming services provided by the unaffiliated cable operator in that area.[2]

Charter seeks a determination that AT&T's offering of its streaming video service DIRECTV NOW in Charter's franchise areas renders Charter's cable systems subject to effective competition under the Local Exchange Carrier test. MDTC argues that the test is not met because – even though DIRECTV NOW offers packages including at least 65 linear programming services similar or identical to those provided by cable systems, as well as thousands of on-demand programs like those available on cable systems – the video programming services offered by DIRECTV NOW are not comparable to those offered by Charter's cable systems.

The basis for this improbable assertion is that the Commission has ruled that "[i]n order to offer comparable programming as that term is used in this section, a competing multichannel video programming distributor must offer at least 12 channels of video programming, including at least one channel of nonbroadcast service programming."[3] Pointing to tentative conclusions reached by the Media Bureau in the *Sky Angel* proceeding regarding whether online video distributors meet the statutory definition of a multichannel video programming distributor ("MVPD"),[4] and to comments submitted by NCTA in the Commission's proceeding considering the same question,[5] MDTC argues that DIRECTV NOW does not offer any "channels" of service and therefore its programming is not comparable for purposes of the statutory test. Not surprisingly, this "gotcha" argument is too clever by half.

The issue that the Bureau and NCTA were addressing in *Sky Angel* and in the subsequent Commission proceeding turned on the definition of the word "channel," because the statutory definition of an MVPD in Title VI of the Communications Act includes the word "channel," and that word is, in turn, defined by the statute for purposes of Title VI. As the Bureau concluded in its Sky Angel Order, and NCTA demonstrated in the subsequent Commission proceeding, the statute defines "channel" to mean something different from one of the multitude of linear cable programming services available on cable, DBS and other programming distributors. Instead, the statutory definition of a channel includes not only programming but also the *transmission path* on which that programming is delivered to subscribers. So, because the statute defines an MVPD as an entity that delivers multiple *channels* of video programming to subscribers, it includes within that definition only facilities-based providers like cable and satellite providers and excludes entities like online video distributors who offer video programming but not the facilities over which such programming is delivered to subscribers. That's not an irrational outcome, since, as NCTA showed, entities defined as MVPDs are subject to a panoply of

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2 47 U.S.C. § 543(l)(1)(D) (emphasis added).

3 47 C.F.R. § 76.905(f).

4 *See* Sky Angel U.S., LLC, Order, 25 FCC Rcd. 3879, 3882-83 (2010).

5 *See* NCTA Comments, MB Docket No. 14-261, at 5-15 (Mar. 3, 2015).

regulations and obligations, many of which are not readily or logically applicable to every online entity that offered multiple video programming streams.[6]

None of these statutory definitions or policy rationales apply to the Local Exchange Carrier test of the statutory definition of effective competition. That test, unlike the definition of an MVPD, nowhere includes the word "channel" and rests solely on whether the video programming services offered by a LEC-owned entity are "comparable" – a term undefined by the statute. The Commission used the term "channel" in its rule defining comparable programming, but it was not bound by the statutory definition of that term. Indeed, it would have been arbitrary and capricious of the Commission to rule that an offering by an online video distributor of multiple linear programming streams of the same programming offered by cable systems was not an offering of "comparable" video programming. That's clearly not what the Commission intended when it ruled that, to offer "comparable" programming, a service provider had to provide at least 12 "channels" of service, and it would be unreasonable and contrary to the statute for the Commission to so rule in this proceeding.

The rate regulation provisions of Section 623 were intended to ensure reasonable basic service tier rates, but only where competitive alternatives were not available to do the job. Congress determined that the availability of a LEC-owned service offering comparable video service "by any means" would be sufficient to exempt cable systems from rate regulation, and, as Charter's petition demonstrates, AT&T's DIRECTV NOW plainly meets that test.

Respectfully Submitted,

/s/ Rick Chessen

Rick Chessen
Michael Schooler

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[6] *Id.* at 21-33.